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NOTES.

LEGAL EFFECT OF ULTRA VIRES CONTRACTS.—It follows logically from the original theory of the nature of the corporate entity, that ultra vires acts are non-corporate acts and mere nullities as far as the corporation is concerned. *Chewalca Lime Wks.* v. *Desmukes F. & Co.* (1888) 87 Ala. 344; *Straus* v. *Eagle Ins. Co.* (1855) 5 Oh. St. 50. There is, however, a strong line of cases in which the courts, upon one theory or another, have enforced the rights and liabilities of a corporation on contracts outside the scope of its authorized powers. *Ayres* v. *Banking Co.* (1871) L. R. 3 P. C. App. 548; *Des Moines Gas Co.* v. *West* (1878) 50 Ia. 16; *Citizens' Bk.* v. *Hawkins* (1896) 71 Fed. 369. But if ultra vires acts are to be dealt with as corporate acts, the question at once arises why the corporation is not bound by them generally as by acts intra vires. The courts have proposed an answer in the express or implied limitations of corporate powers which have been regarded as making acts unlawful, which otherwise would be within the corporate capacity. Thompson, Corp. § 5972, and cases cited. Although violations of express prohibitions are *prima facie* illegal, Morawetz, Corp. § 657, it is open to question whether an act merely in excess of an implied restriction can in any proper sense be treated as an illegal act subject to the rules governing illegal contracts in general. *Bissell* v. *Railway Co.* (1860) 22 N. Y. 258, 269; *Attorney General* v. *Railway Co.* (1879) L. R. 11 Ch. D. 449, 502. But the courts often seem to have made little or no

distinction between prohibited and unauthorized exercise of powers, *Cf. Wright* v. *Pipe Line Co.* (1882) 101 Pa. St. 204, and *Case* v. *Kelly* (1890) 133 U. S. 21; *Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24, and N. Y. R. S. ch. 35, § 10, endeavoring indiscriminately to determine rights and liabilities arising thereon according to the principles governing illegal contracts. *Case* v. *Kelly, supra; People* v. *Chicago Gas Co.* (1889) 130 Ill. 268.

Although the adoption of the illegality doctrine necessarily involves the admission of capacity in the corporation, the cases not infrequently so confuse the two as to make it difficult to assign the proper ground. See *Dunbar* v. *Telegraph Co.* (Ill. 1906) 78 N. E. 423. Yet when title to firm property is involved, the question becomes important, since it can be held to pass if the contract is merely illegal, *Tritts* v. *Palmer* (1889) 132 U. S. 282; *Lancaster* v. *Am. Imp. Co.* (1894) 140 N. Y. 576, but not if the act was not a corporate act at all. *Lafferty* v. *Evans* (Okl. 1906) 87 Pac. 304. Furthermore, results are frequently reached which principles of illegal contracts will not support. For instance, in many cases no distinction is made between the corporation and the other contracting party in allowing a recovery where the contract has been fully performed on one side and the other is in default, although the corporation is obviously the more guilty party. *Whitney Arms Co.* v. *Barlow* (1875) 63 N. Y. 62; Morawetz, Corp. § 693, and cases cited. Again, recovery has been allowed upon the contract where one party has performed, although strictly the only recovery under illegality theories should be quasi contractual; *Bath Gas Co.* v. *Claffy, supra; Wright* v. *Pipe Line Co., supra; Camden Ry. Co.* v. *Mays Landing Ry. Co.* (1886) 48 N. J. L. 530; and actions in disaffirmance of the contract, to recover what has been parted with before default by the other party and before full performance by either have been denied, a result incompatible with the principle of *locus pœnitentiæ,* even though both parties were in *pari delicto. St. Louis Ry. Co.* v. *Terre Haute Ry. Co.* (1891) 145 U. S. 393. Thus, the conception of an ultra vires contract as an illegal contract is found to be inconsistent with the law as applied.

Moreover, it is neither warranted nor necessary to give full effect to the restrictions upon authorized corporate activity. *Bissell* v. *Railway Co.* (1860) 22 N. Y. 258, 271. For wherever the theory of corporate capacity to act outside of the scope of its authorized power is recognized, the true doctrine would seem to be that the constating instruments prescribed as between the State and the corporation the conditions upon which the corporate franchise may be exercised, and as between the stockholders and the corporation the limits of the authorized activity. If, then, all of the stockholders joined in the unauthorized act, the consequences as regards the corporation and third parties would be as though the act were authorized. *Des Moines Gas Co.* v. *West, supra; Bath Gas Co.* v. *Claffy, supra; Martin* v. *Niagara Falls Co.* (1890) 122 N. Y. 165. But if all of the stockholders did not assent to this unauthorized act then it is clear that any dissenting stockholder could restrain the ultra vires act. *Coleman* v. *Eastern Co. Ry.* (1846) 10 Beavan 1; *cf. Kean* v. *Johnson* (1853) 9 N. J. Eq. 401; Angell and Ames, Corp. § 393. It would also appear by analogy to the relation between trustee and cestui que trust that the corporation as a quasi

trustee of the stockholders would be allowed to defend an action brought upon an unauthorized contract upon the ground that not all of the stockholders had assented. *Lucas* v. *White Line Transfer Co.* (1886) 70 Ia. 541; *People* v. *Ballard* (1892) 134 N. Y. 239. Thus, once corporate capacity to act is admitted in an ultra vires transaction, this doctrine presents the only solution which will satisfy the interests of all parties concerned. Of course, in these cases the corporation subjects itself to the liability of forfeiting its corporate franchise at the instance of the State, although the better authorities recently show a tendency to restrict forfeiture to cases involving the public interest. *Cf. Atty. Gen.* v. *Great Eastern Ry. Co., supra;* 11 Harvard Law Review 387.

DEFEASIBLE FEES IN IOWA.—The Supreme Court of Iowa has for several years been puzzling itself over a line of cases involving primarily the doctrine that the extinguishment of an easement does not transfer the legal title to the land, but simply releases the land from its burden, so that the owner of the fee at the time of the extinguishment holds his land free. The difficulty has arisen principally from the interpretation of a statute providing that upon abandonment for eight years of a railroad right of way "the right of way, including the road-bed, shall revert to the owner of the land from which said right of way was taken," Code of 1897, § 2015, while in the last decision in the series an additional stumbling block appeared in the shape of three ambiguous deeds. One M. executed and delivered a deed to a railroad, to whose rights the defendant afterward succeeded, as right of way, the deed providing that if the premises were not used for railroad purposes, the right of way was to revert to M. The latter subsequently conveyed all her land to the plaintiff's father, excepting "the strip heretofore deeded" to the railroad; and the plaintiff claimed through the other heirs of his father under a deed excepting "the right of way," which the railroad later abandoned for more than eight years. Notwithstanding the statute, the court held, two justices dissenting, that the intention of the parties to the original grant must govern, and that plaintiff could not, upon abandonment by the railroad, claim title to the land. *Spencer* v. *Wabash Railroad Co.* (Ia. 1906) 109 N. W. 453.

The result might be reached on the theory that M. originally granted only an easement to the railroad, while excepting from her deed to the plaintiff's father the fee to the strip. But such is not the construction put upon the deeds by the court, whose theory seems to have been this: M. granted to the railroad not an easement but a fee, with a proviso that for non-user the fee should "revert" to her; this fee she excepted in her deed to the plaintiff's father, and the plaintiff's deed was subject to the same exception; so that the plaintiff had no title whatever and, upon non-user and abandonment by the railroad, the fee "reverted" to M. Without passing upon the question of the applicability of the statute the effect of the principal case is twofold. First, it practically overrules the important case of *Smith* v. *Hall* (1897) 103 Ia. 95, where the statute was interpreted as laying down a rule of law that all deeds to railroad companies expressly for railroad purposes were to be construed as granting easements only, see 6 COLUMBIA LAW REVIEW 62;